COURT, U. S.

Nos. 73-850, 73-5825 and 73-5891

In the Supreme Court of the United States

OCTOBER TERM, 1973

AHARON RON, PETITIONER

v.

UNITED STATES OF AMERICA

COLLIN GARNER, PETITIONER

v.

UNITED STATES OF AMERICA

FREDERICK LEE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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INDEX

	Page
Opinions below	2
Jurisdiction	2
Questions presented	2
Statement	3
Argument	8
Conclusion	20

CITATIONS

Cases:

Costello v. *United States*, 350 U.S. 359	9
United States v. *Abbamonte*, 348 F. 2d 700, certiorari denied, 382 U.S. 982	19
United States v. *Agueci*, 310 F. 2d 817, certiorari denied, 372 U.S. 959	19-20
United States v. *Arlen*, 252 F. 2d 491	19
United States v. *Edwards*, 366 F. 2d 853, certiorari denied *sub nom. Jakob* v. *United States*, 386 U.S. 908	19
United States v. *Estepa*, 471 F. 2d 1132	10
United States v. *Terry*, 449 F. 2d 727	19

Statutes:

18 U.S.C. 371	3
18 U.S.C. 1341	3
18 U.S.C. 1343	3
18 U.S.C. 2314	3
18 U.S.C. 4208(a)(2)	4
18 U.S.C. 4208(b)	4
18 U.S.C. 4208(c)	4

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OPINIONS BELOW

The court of appeals wrote no opinion. The district court wrote no opinion dealing with the issues presented by these petitions.

JURISDICTION

The judgment of the court of appeals (R. Pet. App.)[1] was entered on October 31, 1973. The petitions for writs of certiorari in Nos. 73-850 (Ron) and 73-5825 (Garner) were filed on November 29, 1973. The petition in No. 75-5891 (Lee) was filed on December 1, 1973, and is out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether an indictment that is based in part on a government agent's memorandum reporting statements made by another person, and on testimony by that person that the memorandum was a fair and accurate summary of what he knew about the matter

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[1] "R. Pet." refers to Ron's petition (No. 73-850), "G. Pet." to Garner's petition (No. 73-5825), and "L. Pet." to Lee's (No. 73-5891). "R." refers to the numbered documents in the certified record on file in the Clerk's office. Document No. 58 ("R. 58") consists of the transcripts of four pre-trial conferences, held on June 30, September 8, September 13, and November 9, 1972; because the transcripts are separately paginated, it is necessary to identify them by date. "Tr." refers to the trial transcript, in four consecutively paginated volumes. "D.E." refers to the docket entries, which appear at the end of the group of papers captioned "Index to the Record on Appeal."

under inquiry, is invalid because the maker of the statements did not testify at first hand concerning the events within his knowledge (presented by all three petitions).

2. Whether the right to counsel of petitioner Garner, who was unrepresented during the first three days of the nineteen-day trial, was violated in the circumstances of this case (No. 73-5825 only).

3. Whether the evidence was sufficient to support the conviction of petitioner Lee (No. 73-5891 only).

STATEMENT

Petitioners and three co-defendants, William Champion, Louis Beck, and Emanuel Lieberman (referred to herein by his alias, "Lester"), were charged in a seven-count indictment filed in the United States District Court for the Southern District of New York with using wire communication facilities and the mails in furtherance of a scheme to defraud (Counts One through Five), transporting in foreign commerce bank checks known to have been taken by fraud (Count Six), and conspiracy to commit these offenses (Count Seven), in violation of 18 U.S.C. 1343, 1341, 2314, and 371, respectively (R. 1). Following a jury trial, each petitioner was convicted on the conspiracy count, and petitioner Ron was also convicted on all but one of the substantive counts (Tr. 2924-2927).[2]

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[2] Ron was acquitted on Count Four, involving one of the charged wire communications (Tr. 2926). Petitioners Garner and Lee were acquitted on all of the substantive counts (Tr. 2936-2937). Co-defendant Champion was acquitted on the

Petitioner Ron was sentenced to concurrent terms of five years' imprisonment on Counts One, Two, and Three, and to concurrent terms of five years on Counts Five, Six, and Seven, to run consecutively to the sentences on the first three counts (a total of ten years), subject to the early parole eligibility provisions of 18 U.S.C. 4208(a)(2). He was also fined $5,000 on each of Counts Six and Seven (R. 57). Petitioner Garner was provisionally sentenced to five years' imprisonment, subject to the study provisions of 18 U.S.C. 4208(b) and (c) (R. 45). Petitioner Lee was sentenced to three years' imprisonment, execution of all but three months of which was suspended (R. 46). The court of appeals affirmed.

1. The alleged scheme involved the theft of stock warrants by petitioners Garner and Lee and co-defendant Champion; the arrangement by co-defendant Beck (an associate of petitioner Ron) with a Bahamian trust company for the sale of the warrants without disclosure that they were stolen; deposit of the proceeds in two Canadian banks under a fictitious name; and the receipt by co-defendant Lester, through use of that fictitious name, of $10,000 in partial realization of the scheme's objectives (R. 1, pp. 1-3). Except with respect to Beck (not a petitioner, see note 2, *supra*), the evidence was not in dispute. Because

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substantive counts, and the jury was unable to agree on a verdict as to the conspiracy count (Tr. 2951-2952). The jury was unable to agree as to any count with respect to co-defendant Beck (Tr. 2951). Co-defendant Lester was incarcerated in Canada at the time of trial, and his case was severed.

only petitioner Lee challenges the sufficiency of the proof to sustain his conviction, only the evidence pertinent to him will be summarized.[3]

In the fall of 1969, several hundred thousand dollars' worth of Leasco Data Corporation stock warrants were stolen from Goodbody & Company, a Wall Street brokerage firm that employed petitioner Lee and co-defendant Champion (Tr. 948-956, 1449-1460, 1480-1500, 1586-1595, 1608-1612, 2738-2740). In October 1969, co-defendant Lester, to whom petitioner Garner had been introduced by Joseph Hagins (a self-acknowledged co-conspirator who testified for the government), asked Garner if he had access to the securities of a brokerage house. Lester said he was particularly interested in Treasury notes and advised that he would pay fifty per cent of the face value of any such securities Garner could furnish him (Tr. 378-379, 398-400). Garner introduced Hagins to Lee and Champion, who expressed interest in Lester's proposal and asked Hagins if Lester could be trusted not to cheat them. Hagins vouched for Lester's reliability (Tr. 401-416). Garner told Lester about the meeting with Lee and Champion and advised him that the "parties involved" thought it would be best to deal in warrants, because warrants were not watched as carefully as other securities at "the house" (Tr. 525-526).

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[3] Because of the close association between Lee and petitioner Garner, the same evidence, as will be noted, was equally pertinent to Garner. Petitioner Ron has not contested here or below the sufficiency of the evidence supporting his conviction. Indeed, Ron filed no brief in the court of appeals.

A few days later Garner delivered to Lester warrants of Leasco Data Corporation worth $850,000, endorsed in the Goodbody "street name," together with a number of Leasco warrants that were registered in the names of individuals and trust companies (Tr. 417-420, 518-524). Garner and Lester separated the "street name" warrants from the privately registered ones, Garner explaining to Hagins (who was present) that the privately registered warrants were "no good" and would be destroyed (Tr. 419-420, 518, 520-521). After Garner, using a Goodbody rubber stamp he had brought with him, had stamped the "good" warrants, Lester paid him $1,000 as a "good faith gesture" (Tr. 418-419, 522, 524-525).

Two days later Lester, whose agreement with Garner had been that he would pay fifty per cent of the warrants' value within ten days of delivery, told Hagins he would not be able to keep this commitment because the warrants could not all be sold within so short a time without unduly depressing the price (Tr. 524-525, 527-530). Lester proposed that they be sold in blocks, at weekly intervals, and that Garner and his associates be paid $50,000 a week until all had been sold (Tr. 530). Hagins advised Garner, Lee, and Champion of the problem and of Lester's proposal (Tr. 531-533). A week later, when Lester was also unable to satisfy the modified commitment, he gave Hagins a $5,000 check of petitioner Ron's with which to placate Garner and his principals, and he told Hagins that he could get in touch with Ron whenever he wished to communicate with Lester (Tr. 533-539).

Through Ron, Hagins met co-defendant Beck, who had copies of the warrants and asked Hagins whether more were available (Tr. 556-562).

Following Beck's arrangement for the sale of the warrants and the deposit of the proceeds in the Canadian banks (activities with which Lee, so far as appears, had no connection),[4] Lester received two checks, representing part of the proceeds, drawn on the Bank of Montreal and payable to "Michael Van Beuren" (the ficitious name under which the proceeds had been deposited in Canada). Lester tried to cash the checks, in the amounts of $70,000 and $20,000, at the New York agency of the Montreal bank. The agency refused to cash the checks but, at Lester's request, issued him nine $10,000 checks in exchange for them (Tr. 574-577, 1114-1127). Another bank, after Lester had been introduced to it by Beck as Van Beuren, cashed one of the $10,000 checks (Tr. 577-582, 1158-1188). Lester gave the $10,000 to Hagins, who delivered it to Lee (Tr. 582-585). Lee gave Garner and Hagins each $1,000 and kept $8,000 (Tr. 585-586).

The conspirators' further plans were interrupted shortly afterward when Canadian authorities arrested Lester (Tr. 586-587, 593-595, 1275-1281).

2. Hagins appeared before the indicting grand jury, identified a memorandum in which an F.B.I. agent had reported statements made by Hagins about

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[4] The substantive counts charging use of the mails and of wire communication facilities involved communications to and by Beck in connection with these transactions (R. 1, pp. 3-5).

the matter under inquiry, said he had read the memorandum, and testified that it was a fair and accurate summary of his knowledge of the facts stated in it. The foreman then excused the witness at the request of government counsel and the prosecutor read the memorandum to the grand jury. The grand jury was advised that it had the right to hear live testimony from any witness it chose (G. Pet. App. A5, A8-A9).[5] Copies of the memorandum and of the transcript of Hagins' grand jury testimony concerning it were supplied to each defendant at trial (Gov. Exs. 3519, 3522; Tr. 433, 549-553, 790, 812), and the documents were used by the defense for impeachment purposes during Hagins' cross-examination (Tr. 705-708, 729-733, 764-768, 787-788, 792-799).

ARGUMENT

1. There is no merit to petitioners' contention that the indictment was invalid because it was improperly based on the F.B.I. agent's hearsay memorandum reporting statements made by Hagins about the subject of inquiry (R. Pet. 2, 9-14; G. Pet. 2, 6-8; L. Pet. 19). They claim that, since Hagins was available as a witness and in fact testified before the grand jury, he should have been interrogated at first hand and in detail about the facts within his knowledge,

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[5] In addition to the report and Hagins' testimony with respect to it, the grand jury heard live testimony by at least four other witnesses and verbatim transcripts of the testimony of twelve additional witnesses before a prior grand jury (G. Pet. App. A8-A10).

and that it was improper for the prosecutor, after establishing through Hagins that the memorandum accurately summarized what he knew of the matter, to excuse him and simply read the memorandum. But even if the memorandum had constituted the entire evidence before the grand jury, an indictment returned on that basis would not have been subject to challenge. *Costello* v. *United States*, 350 U.S. 359 (indictment valid though based entirely on hearsay). An indictment is surely no less valid where the declarant actually attests to the correctness of the statements attributed to him. Indeed, such testimony in effect transforms what was hearsay into direct evidence. At least where, as here, the grand jury is specifically told it has the right to hear live testimony from any witness it chooses, there can be no valid objection to the procedure, employed here, of reading to the grand jury a compact summary by an investigative agent, the accuracy of which is vouched for by the declarant, of statements the agent deemed relevant to the inquiry.

There is no substance to petitioner Ron's suggestion that the procedure employed had the effect of shielding Hagins at trial against the possibility of impeachment based on prior inconsistency (R. Pet. 12-14). By attesting to the correctness of the agent's report of his statements, Hagins in effect adopted the reported statements as his own and made himself liable to impeachment on the basis of them. Indeed, attempts were in fact made at trial to impeach Hagins on the basis of the statements and his testimony.

United States v. *Estepa*, 471 F. 2d 1132 (C.A. 2), relied on by petitioners, is not in point. There, a conviction was reversed and an indictment ordered dismissed because the grand jury had been misled into thinking it was hearing eyewitness evidence when in fact the testimony presented had been hearsay. No such deception was involved here.

2. Petitioner Garner was unrepresented by counsel during the seven months preceding, and the first three days of, the four-week trial. He contends that his constitutional right to counsel was thus violated (G. Pet. 2-6).[6] The relevant facts are as follows:

The indictment was returned on February 24, 1972, and trial commenced a year later, on February 6, 1973 (R. 1; D.E. 4).[7] From March 6 to July 12, 1972—during which period all preliminary motions were filed, heard, and submitted[8]—Garner and petitioner Lee were jointly represented by retained

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[6] Petitioner Lee "incorporates by reference" the "points" urged by Garner in his petition (L. Pet. 19). However, Garner's contention with respect to counsel is inapplicable to Lee. Following the dismissal of the two petitioners' jointly-retained initial attorney (see *infra*), substitute counsel was assigned Lee (substantially in advance of trial), and that attorney continued to represent him for the balance of the proceedings (cf. L. Pet. 3).

[7] The trial ended March 5, 1973, following nineteen days of actual proceedings (D.E. 4-5).

[8] The motions filed on Garner's behalf included, among others, detailed requests for discovery, inspection, and particulars, and for a severance. They were granted in part and denied in part in a two-page order entered October 31, 1972 (R. 27).

counsel, H. Spencer Kupperman (R. 2, 7, 13, 20, 27; R. 58, June 30, 1972, pp. 14-23). On June 5, 1972, Kupperman requested leave to withdraw as counsel for Garner on the ground that Garner's and Lee's interests conflicted (R. 35).[2] In an affidavit accompanying this request, in addition to noting the conflict, Kupperman advised that "fees were a problem" with Garner; that Garner, though employed, was having difficulty paying the agreed retainer; and that, in the attorney's opinion, Garner would qualify for court-appointed counsel (R. 35, pp. 2-3).

At a hearing held on June 30, 1972, the court determined that, in view of the reported conflict, Kupperman would be unable to represent either client further and directed Garner to report with new counsel on July 12 (R. 58, June 30, 1972, pp. 14-19). The court expressed the opinion to Garner that the twelve-day interval would give him ample time in which to obtain a new attorney; requested that he make every effort to do so; and said it would be necessary, if he did not, to keep adjourning the proceedings until he succeeded (*id.* at 17). In response to a suggestion by government counsel that it might be worthwhile to inquire whether Garner qualified to have counsel appointed, the court noted that Garner had not indicated that he was unable to obtain counsel and observed that it would be preferable from Garner's standpoint that he have an attorney of his own choosing. In response to inquiries by the court,

[2] The attorney advised in his affidavit that the conflict did not affect the preliminary motions (R. 35, p. 2).

Garner said he was aware that if he were indigent and could not afford counsel the court would appoint an attorney for him, but that the attorney would be from the court's panel and would be selected by the court, not him. He said he wished to choose his lawyer himself (*id.* at 18).

On the adjourned date, July 12, 1972, proceedings involving co-defendants were held (D.E. 3), but whether Garner attended does not appear; in any event, he had not yet retained new counsel. The next reference to Garner in the record is a docket entry for July 20, 1972, stating that there was "[n]o appearance" by him on that date and that a bench warrant for his apprehension was issued (*ibid.*).[10] The pertinent circumstances do not appear.

On September 13, 1972, two weeks after the government had announced its readiness for trial (R. 22), an attorney named Alfred Toombs appeared with Garner at a pre-trial conference, advised the court that he and Garner had discussed and agreed on a retainer, and requested that he be allowed two weeks to decide whether he would undertake to represent him (R. 58, September 13, 1972, p. 2). The attorney explained that his prospective client was employed but had to make certain arrangements to get the money (*ibid.*). The court, noting that if Toombs decided to take the case there would be unavoidable delays resulting from his having to familiarize himself with what had so far occurred and to file such

[10] Garner had been free on his personal recognizance bond, in the amount of $10,000, since March 8, 1972 (R. 4).

additional motions as he might wish, asked the attorney to decide within a week whether he would accept the retainer. Toombs agreed (*id.* at 2-3). Government counsel, observing that Garner had had two months in which to secure new counsel, objected to the delay and requested that the attorney be required to decide then whether he would file his appearance. The court noted that the delays to date had not been Toombs' fault and denied the request (*id.* at 3-4). After conferring with Garner and being informed that his payday was the 20th, Toombs requested that he be given till the 21st to advise whether he would take the case. The court consented (*id.* at 5). The court advised the attorney that it would expect him to file his appearance on the 21st if Garner made a substantial payment on account by that date, and Toombs indicated that this would be satisfactory (*id.* at 6-7). Government counsel, pointing out that Garner had had a retained attorney, that he presumably had the means to retain another, and that he was aware he could ask to have counsel assigned if he did not have the means, asked the court to instruct Garner that, if his arrangement with Toombs did not work out, he should appear on the 21st with other counsel. The court denied the government's request but elicited from Garner the assurance that he understood the importance of his taking care of the representation matter promptly (*id.* at 6, 8). For reasons that do not appear, Toombs was not employed by Garner.

On November 9, 1972, the court informed Garner that the case was set for trial on February 5, 1973.

Garner said he was "working on" the matter of securing counsel (R. 58, November 9, 1972). On December 12, 1972, a second bench warrant for Garner's apprehension was issued (D.E. 4); the relevant circumstances do not appear in the record. On January 17, 1973, Garner appeared in court, the bench warrant was vacated, and he was instructed to appear for trial on February 6 (*ibid.*).

Trial commenced, as scheduled, on February 6, 1973, Garner appearing *pro se* (D.E. 4). The first day's proceedings (which evidently were limited to empaneling the jury) have not been transcribed. On the second day, February 7, following the making of opening statements to the jury (Tr. 102-159),[11] an attorney named Michael Standard appeared, advised the court that a friend of Garner had asked him to discuss with Garner the matter of representation, and requested leave to confer with him (Tr. 165-166). Prior to granting the requested permission, the court stated to the attorney that Garner was in the posture of a person who worked, was not indigent, and was capable of paying a reasonable attorney's fee but who had been unsuccessful in obtaining counsel; that the court had admonished Garner to present his problem to the Bar Association,[12] but that he had not done so; that apart from that fail-

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[11] In a brief *pro se* opening, Garner denied criminal involvement and said he was waiting for his lawyer to arrive (Tr. 152).

[12] The record does not indicate when this admonition was given.

ure, he had made what the court felt had been reasonable efforts to get a lawyer; and that if Standard or one of his associates could accept his retainer, the court would accommodate the interests of all concerned to every extent possible, except that, because the court believed Garner had had more than ample opportunity to secure representation, it would not entertain a motion for a severance (Tr. 166-167; G. Pet. App. A1-A2). After conferring with Standard, Garner informed the court that Standard had said he would be unable to represent Garner due to a conflicting court engagement, but that he would have an associate communicate with Garner the next day to see whether he could take the case (Tr. 173).

On the following day, Garner advised the court that he had been told by Standard that the associate would also be unable to represent him because his schedule too precluded it, but that Standard was making other arrangements to get him a lawyer and that Garner should call him at the end of the day's proceedings (Tr. 358). Shortly thereafter Garner asked the court whether he would be entitled to appointed counsel if he did not have a job. The court said he would be so entitled if he had no job and no money, but that the court would not be party to an arrangement whereby Garner would quit his job in order to make himself indigent (Tr. 360-361; G. Pet. App. A3-A4). In reply to a comment by the trial judge that he wished Garner had gone to the Bar Association, as the court had "practically directed" him to do, Garner said that he had called someone

at the Bar Association, learned that he was out, and waited for him to call back, but that the person had not done so and Garner had been "scared" to pursue the matter further (Tr. 361; G. Pet. App. A4).

Following the proceedings on February 8, the trial was recessed to February 13 (Tr. 429). On February 12, Garner retained H. Miles Jaffe, his present counsel, to represent him (Tr. 438), and Jaffe did so for the balance of the trial. On February 13 Jaffe moved for a mistrial as to Garner, noting his lack of counsel during the trial's first three days (Tr. 440-441). Government counsel, opposing the motion, noted among other things that only two witnesses had completed their testimony and that their testimony, transcripts of which had been supplied Jaffe, hardly touched on Garner;[13] that the third witness, Hagins, who had implicated Garner, was still on the stand, and had not gone very far in his testimony;[14] and that Jaffe had had the Hagins-related "3500 [Jencks Act] material" since the previous day—substantially sooner than he would have been entitled to it even if he had been in the case from the beginning (Tr. 441-442). In denying the motion for mistrial, the court noted that Garner had failed to do all he should have done (and that the court had urged him to do) to secure counsel sooner (Tr. 443-444). The court also

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[13] Actually, neither witness had referred to Garner at all (Tr. 174-232, 238-352).

[14] Hagins had commenced testifying on the afternoon of the last previous day of proceedings (Tr. 353) and had not yet concluded his direct testimony.

said it believed that Garner had not been significantly prejudiced by his lack of counsel so far in the trial, noting in this regard, *inter alia*, that Garner had handled himself very well in his opening statement to the jury and had come "through to the jury as a sincere person who [was] conducting himself with complete propriety * * *" (Tr. 443). The court advised Jaffe that it would be open to him, should he feel he could point to any specific thing during the rest of the trial that suggested that Garner had been prejudiced by his previous lack of counsel, to renew his motion, and that the court would then reconsider the matter (Tr. 443-444). The matter was not again raised.

Garner contends that the issue presented is whether a defendant who is financially unable to retain counsel has a right to assigned counsel although he is not indigent (G. Pet. 2, 5-6). But the record fails to support the implied claim that Garner was financially unable to retain counsel. Garner had a retained attorney initially, and he was represented at trial by retained counsel. Kupperman, the intially retained attorney, was relieved of his duties only because of the reported conflict of interests between his clients. Between the time of Kupperman's discharge and the employment of Jaffe, Attorney Toombs and Garner discussed and agreed on a retainer, which the attorney indicated would be acceptable if he received a substantial payment on account by Garner's next payday. Why the discussed employment did not follow does not appear in the record. Attorney Standard

and his associate, the other lawyers involved in the proceedings prior to the employment of Jaffe, were unable to take Garner's case, but the reasons, the record indicates, involved schedule conflicts, not financial considerations.

Knowing he was entitled to have an appointed attorney if he lacked the financial means to employ one, and having advised the court that he wished to select his own counsel, Garner had seven months between the discharge of his first attorney and the commencement of trial within which to retain a successor. Aware that Garner's financial circumstances were modest, the court was of the view—correctly as events proved—that with proper efforts he would be successful in retaining new counsel. The court contemplated that those efforts would include a request by Garner for assistance from the Bar Association—a course the court "practically directed" Garner to follow. Garner, as he acknowledged to the court, never pursued the suggested course beyond the placing of an unreturned phone call. While the court believed that Garner had made reasonable efforts apart from that failure to find new counsel prior to the start of the trial, the court also felt that Garner's omission to take the action he had been requested to take was a substantial contributing cause of his failure to secure counsel sooner than he did. The court concluded, in other words, that it was largely Garner's own fault that he was required to go to trial unrepresented. Especially since Garner showed he was able to retain counsel speedily enough once trial

had started, that judgment, it is submitted, cannot be faulted. Cf. *United States* v. *Arlen*, 252 F. 2d 491 (C.A. 2); *United States* v. *Abbamonte*, 348 F. 2d 700 (C.A. 2), certiorari denied, 382 U.S. 982; *United States* v. *Terry*, 449 F. 2d 727 (C.A. 5). The court's refusal to grant a mistrial involved an exercise of sound discretion, not shown to have been abused, in a difficult situation that had arisen out of a unique combination of circumstances. No question of general importance to the administration of the criminal laws, or other issue warranting plenary review by this Court, is presented.

3. There is no merit to petitioner Lee's contention that the evidence was insufficient to support his conviction (L. Pet. 14-18). Lee concedes the sufficiency of the proof that he and Champion stole the warrants (L. Pet. 17) but argues that the evidence failed to link him with Beck or the international dealings through which Beck disposed of them. The evidence showed, however, that Lee was party to a conspiracy with, at least, Garner, Champion, Hagins, and Lester to sell on consignment stolen securities which he and Champion were to furnish. While Lee may not have known Beck, he knew that Lester and persons associated with him were involved in fencing the warrants. It is not important that Lee may not have known who else was involved, or exactly how disposition of the warrants was to occur. Cf. *United States* v. *Edwards*, 366 F. 2d 853, 866-867 (C.A. 2), certiorari denied *sub nom. Jakob* v. *United States*, 386 U.S. 908; *United States* v. *Agueci*, 310 F. 2d

817, 826-827 (C.A. 2), certiorari denied, 372 U.S. 959.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petitions for writs of certiorari should be denied.

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